

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL RIFLE ASSOCIATION)
OF AMERICA,)
 Petitioner,)
 v.) No. 22-842
MARIA T. VULLO,)
 Respondent.)
- - - - -

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NATIONAL RIFLE ASSOCIATION)
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Petitioner,)
v.) No. 22-842
MARIA T. VULLO,)
Respondent.)
- - - - -

Washington, D.C.
Monday, March 18, 2024

The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 11:49 a.m.

1 APPEARANCES:
2
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7 United States, as amicus curiae, supporting
8 neither party.
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P R O C E E D I N G S

(11:49 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-842, National Rifle Association versus Vullo.

Mr. Cole.

ORAL ARGUMENT OF DAVID D. COLE

ON BEHALF OF THE PETITIONER

MR. COLE: Mr. Chief Justice, and may it please the Court:

Government officials are free to urge people not to support political groups they oppose. What they cannot do is use their regulatory might to add "or else" to that request.

Respondent Vullo did just that. Not content to rely on the force of her ideas, she abused the coercive power of her office. In February 2018, she told Lloyd's, the insurance underwriter, that she'd go easy on its unrelated insurance violations if it aided her campaign to weaken the NRA by halting all business with the group. Lloyd's agreed.

Six weeks later, she issued guidance letters and a press release directing the

1 thousands of banks and insurance companies that
2 she directly oversees to cut off their ties with
3 the NRA not because of any alleged illegality
4 but because they promote guns.

5 In the accompanying press release,
6 Vullo's boss and co-defendant, Governor Andrew
7 Cuomo, said he directed Vullo to issue the
8 guidance because doing business with the NRA
9 "sends the wrong message." Shortly thereafter,
10 Vullo extracted legally binding consent orders
11 from the NRA's three principal insurance
12 providers, barring them from ever providing
13 affinity insurance to the group ever again, no
14 matter how lawfully they do so.

15 These actions worked as multiple
16 financial institutions refused to do business
17 with the NRA, citing Vullo's threats. This was
18 not about enforcing insurance law or mere
19 government speech. It was a campaign by the
20 state's highest political officials to use their
21 power to coerce a boycott of a political
22 advocacy organization because they disagreed
23 with its advocacy.

24 Governor Cuomo essentially conceded as
25 much in two tweets responding to this lawsuit in

1 which he said, and I quote, "The regulations New
2 York put in place are working. We're forcing
3 the NRA into financial jeopardy. We won't stop
4 until we shut them down." "It's time to put the
5 gun lobby out of business. #BankruptTheNRA."

6 At the motion to dismiss stage, the
7 only question is whether these allegations,
8 taken as a whole, plausibly plead a First
9 Amendment claim. Because Vullo chose coercion
10 over persuasion, they do.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Mr. Cole, what is the
13 speech here, protected speech, that you allege
14 has been suppressed?

15 MR. COLE: Promoting guns, advocating
16 for gun rights, sending the wrong message. It
17 is -- it -- it is that -- the -- it was -- it's
18 precisely the speech of the NRA which caused
19 Vullo and Cuomo to decide to target their --
20 their partners and seek to coerce them into
21 boycotting the NRA. So they are seeking to
22 penalize the NRA because of its speech
23 advocating for gun rights.

24 JUSTICE THOMAS: So your argument is
25 that the sanctions on a third party suppress the

1 speech of NRA?

2 MR. COLE: Yeah, it -- it doesn't it
3 -- it -- Your Honor, it doesn't -- it -- it --
4 the -- the Court's First Amendment jurisprudence
5 does not require proof of suppression. It
6 requires proof of burden. If Vullo had imposed
7 a \$1 fine on the NRA for promoting guns, it
8 would be unquestionably unconstitutional even
9 though it wouldn't actually suppress their
10 speech.

11 But, here, we have actually alleged --
12 and this is at the motion to dismiss stage, the
13 allegations are true -- that the NRA has been --
14 has cost -- it has cost the NRA millions of
15 dollars as a result of the kinds of -- of -- of
16 coercion that has been put in place here and
17 that the NRA, like any other advocacy group,
18 relies on banks, relies on insurance companies
19 to be able to do their business. And what is
20 their business? Political advocacy.

21 JUSTICE JACKSON: Isn't the issue of
22 coercion different, though, than the First
23 Amendment question? I mean, you are relying on,
24 I think, Bantam Books, is that correct?

25 MR. COLE: Yes.

1 JUSTICE JACKSON: As I read that case,
2 there were really two different things going on.
3 There was an unconstitutional prior restraint,
4 and the Court recognized that. And there was
5 the implementation of that unconstitutional
6 restraint through the means of government
7 coercion.

8 So, if I'm right about that in terms
9 of how we should be thinking about Bantam Books,
10 then don't we have two different questions here,
11 the first being did Vullo actually coerce any
12 regulated entities to do something vis-à-vis the
13 NRA, and then was that something a violation of
14 the NRA's First Amendment rights, say, through
15 retaliation or censorship, which are the two
16 theory -- First Amendment theories that I pick
17 up from your complaint?

18 MR. COLE: Yeah. Justice Jackson, I
19 think what Bantam Books stands for is that
20 government officials are free to encourage
21 people to take -- to -- to -- take down speech
22 or to -- to penalize a group. What they are not
23 free to do is to use coercion to that end.

24 Here, there's no question on this
25 record that they encouraged people to punish the

1 NRA precisely because and only because of its
2 political views.

3 JUSTICE JACKSON: No, I understand
4 that, but --

5 MR. COLE: So the question is, is
6 there coercion? That's the whole --

7 JUSTICE JACKSON: No, no, but -- but
8 -- but -- but there are two different pieces,
9 right? You have to show that there's coercion,
10 and you alleged that, but you also have to show
11 that that coercion resulted in a First Amendment
12 violation.

13 Bantam Books is saying you can't do
14 indirectly what you can't -- right, what you
15 can't do directly. But the direct thing in
16 Bantam Books was a prior restraint. This here
17 doesn't look like a prior restraint. So what is
18 your -- this is sort of Justice Thomas's
19 question again, right? What is your theory of
20 the First Amendment?

21 MR. COLE: Again, it's the same answer
22 as to Justice Thomas. The First Amendment -- of
23 course, the First Amendment prohibits absolute
24 censorship or suppression of speech, but it also
25 prohibits the imposition of any burden on speech

1 because of its content.

2 You know, even if the government
3 denies a contract to an entity because it
4 disapproves of what that entity says --

5 JUSTICE JACKSON: Right, but isn't the
6 hard part figuring out whether the burden is
7 being imposed because of the content of the
8 speech or because of the conduct?

9 MR. COLE: Well, in my --

10 JUSTICE JACKSON: I mean, that's -- so
11 -- so that's why we have to be really careful
12 about what you're alleging is the First
13 Amendment problem because the government can
14 regulate conduct, correct?

15 MR. COLE: I agree. And if this was a
16 case in which the government had said, you know,
17 the -- the NRA is violating the law left and
18 right and we have to respond to that and here
19 are the legal obligations, that would be one
20 thing.

21 That is not what they said. They said
22 we want to shut the NRA down, we want to put the
23 gun lobby out of business. Why? What -- the
24 title of the guidance letters that she issues
25 are Guidance Regarding the NRA and Other Gun

1 Promotion Organizations. The whole guidance is
2 saying, I don't like the fact that people use
3 guns. I don't like the fact that people
4 advocate for the use of guns. We need to stop
5 this. We need to stop this now.

6 JUSTICE JACKSON: Isn't that her
7 motivation? I mean, I understand, that sounds
8 to me more like a retaliation kind of First
9 Amendment theory, as opposed to something that's
10 happening in Bantam Books, which is pressure
11 being applied to actual entities that themselves
12 are speech distributors so that those entities
13 are censoring the speech as -- you know, as in
14 their power because they are the kinds of
15 things -- they're book distributors or et
16 cetera.

17 These are insurance companies who are
18 being pressured, and so it's at least attenuated
19 in that sense, the -- the impact on speech,
20 correct?

21 MR. COLE: So, if the government were
22 providing insurance, it had a contract with --
23 let's say it provided some sort of insurance to
24 advocacy organizations, and it said we'll give
25 insurance to some, but we're not going to give

1 it to advocacy organizations that disagree with
2 us and that, for example, promote guns, that
3 would be a clear violation of the First
4 Amendment. It would not be censorship. It
5 would not be suppression. But it would be a
6 penalty imposed because of the viewpoint
7 expressed by the organization.

8 In this case, Maria Vullo herself and
9 Governor Cuomo made it absolutely clear both in
10 closed-door meetings with Lloyd's and in public
11 guidance letters and in tweets about this case
12 that they were singling out the NRA not for
13 insurance law violations; they were singling out
14 the NRA because it promoted guns, and they were
15 against the promotion of guns.

16 They can advocate against the
17 promotion of guns. They can encourage people
18 not to support groups that like the NRA. What
19 they can't do is then invoke the coercive
20 authority of her office.

21 And look at the guidance letters.
22 She -- she could have written an op-ed if she
23 was, you know, moved by the -- the -- the
24 problems of gun violence, but she didn't. She
25 invoked her statutory authority, unique

1 statutory authority, to issue guidance letters.
2 What are guidance letters? According to
3 Respondent, they are designed to tell regulated
4 entities their obligations.

5 Then, in that guidance letter, what
6 she does is go on for four paragraphs about how
7 bad guns are and then, in the fifth paragraph,
8 says, in light of the above, we urge you to
9 reconsider your relations with the NRA and other
10 gun promotion organizations, no evidence that
11 any other gun promotion organizations are
12 involved in any insurance illegality or
13 anything, and reconsider your risks and manage
14 those risks, take prompt action.

15 And then she issues a press release
16 that same day in which she says, cut your ties
17 --

18 JUSTICE BARRETT: Mr. Cole --

19 MR. COLE: -- in order to manage your
20 risk.

21 JUSTICE BARRETT: -- can I ask you a
22 question? Are you asking the Court to break any
23 new ground in this case?

24 MR. COLE: Absolutely not. This is a
25 -- this is about as square corners a Bantam

1 Books case as you can imagine.

2 JUSTICE BARRETT: How does your
3 understanding of Bantam Books differ if at all
4 from Respondent's and from the SG's?

5 MR. COLE: So the -- the SG, as you'll
6 note, is essentially on our side in this case,
7 formerly in support of neither party but taking
8 our time because they're supporting reversal on
9 the merits question.

10 We believe that you do have to
11 demonstrate coercion. You have to demonstrate
12 some coercive threat, some invocation of
13 regulatory adverse action. We have that here.
14 We have it with the insurance law enforcement.
15 We have it with the invocation of reputational
16 risk.

17 Reputational risk, she didn't just
18 say, you know, guns are bad, you should
19 reconsider your relationship with the NRA. She
20 said guns are bad, you should reconsider your
21 relations with the NRA because it's a
22 reputational risk if you don't.

23 JUSTICE KAGAN: But that idea of
24 reputational risk, Mr. Cole, that is a real
25 idea, right?

1 MR. COLE: Yeah.

2 JUSTICE KAGAN: It wasn't invented for
3 the NRA. There is a view that bank regulators
4 have that companies are supposed to look at
5 their reputational risks.

6 MR. COLE: Right, right.

7 JUSTICE KAGAN: And so how do we know
8 -- I mean, I take -- I -- there's obviously a
9 lot about guns in that letter. But it might be
10 that gun advocacy groups, gun companies do
11 impose reputational risks of the kind that bank
12 regulators are concerned about.

13 So how -- where do you -- how do
14 you -- how do we know?

15 MR. COLE: So I don't think -- I don't
16 think you actually have to make that decision,
17 Justice Kagan. The -- the question under Bantam
18 Books, there's two elements to Bantam Books.
19 Did the government urge third parties to
20 penalize or suppress speech, one, and two, did
21 they use coercion to effectuate that
22 encouragement.

23 And the -- the invocation of
24 reputational risk is the use of coercion.
25 Whether or not it is, in fact, a reputational

1 risk or not, it is still the use of the coercive
2 authority of the state to encourage these
3 entities to punish the NRA because of its
4 speech, to cut their ties. That's number one.

5 Number two, look at the Lloyd's
6 meeting. There's no discussion about
7 reputational risk there. She said --

8 JUSTICE KAGAN: So I -- I -- I put the
9 Lloyd's meeting in a different category and was
10 really more interested in -- in -- I think that
11 this is a closer one just because if -- if -- if
12 -- reputational risk is a real thing, and if gun
13 companies or gun advocacy groups impose that
14 kind of reputational risk, isn't it a bank
15 regulator's job to point that out?

16 MR. COLE: So it -- it -- it -- it
17 may well be. And -- and in Bantam Books, the
18 Court says that there's a safe harbor for
19 genuine advice about -- about law enforcement.

20 This was not genuine advice about law
21 enforcement. Why would she spend four
22 paragraphs, you know, denouncing guns? That
23 actually has nothing to do with whether there's
24 reputational risk. That has everything to do
25 with what she said in the meeting with Lloyd's

1 she was trying to do: leverage her authority to
2 weaken the NRA because she disagreed with its
3 political viewpoints.

4 So, yes, reputational risk, if it was
5 employed in a content-neutral way to -- to -- to
6 address conduct across the board that raises
7 reputational risk, that's one thing. If you use
8 it -- it's a very broad term. If you use it to
9 target a particular political group because you
10 disagree with its point of view and you announce
11 that, you know, in your -- in the very document
12 in which you're doing it and in the press
13 release in which, again, Andrew Cuomo says, I
14 directed her to issue the guidance because doing
15 business with the NRA sends the wrong message,
16 that is not creates reputational risk. That is
17 it -- it supports an organization that I as
18 governor disagree with.

19 And he can disagree with it. He can
20 urge people not to support it. What he can't do
21 is, again, invoke the coercive power of the
22 state in this way.

23 And whether or not there is a
24 reputational risk or not I don't think
25 ultimately changes the outcome if you're using

1 coercive authority.

2 Take Bantam Books. Suppose in Bantam
3 Books the -- the Commission had, instead of
4 sending the police to visit and say, hey, how's
5 it going, have you taken the books down, they
6 said, we're going to send the police to the
7 bookstores that continue to sell these books and
8 look into code violations, building code
9 violations, and they, in fact, found code
10 violations, and they enforced those code
11 violations against those bookstores.

12 They -- that would be a legal
13 activity. The code violations is a legal
14 activity. There's nothing illegitimate about
15 looking into code violations. But, if you're
16 doing it to give force, give coercive power to
17 a -- a -- a -- a -- a government effort to
18 encourage a third party to suppress speech, it
19 violates the First Amendment.

20 JUSTICE BARRETT: Mr. Cole, speaking
21 of violations, the -- your friends on the other
22 side complain that you haven't made the adequate
23 showing for a retaliation claim.

24 So how do you distinguish between a
25 Bantam Books claim like the one that you're

1 bringing and a retaliation claim under Nieves?
2 And is it just a pleading choice, or do you want
3 to say a little bit more about that?

4 MR. COLE: Yeah. So I -- I don't
5 think the Nieves question is here at all because
6 this is a question about whether the First
7 Amendment, the scope of the First Amendment, was
8 violated by these actions.

9 Nieves is about -- as you know, is
10 about Section 1983, where there's a particular
11 remedy, a particular damages remedy. We have an
12 injunctive relief claim in this case which
13 continues to be live and which would, I think,
14 appropriately require taking down the guidance
15 letters, which remain on the New York DFS
16 website to this day warning businesses not to do
17 business with the NRA.

18 So we have an injunctive claim. So
19 that takes it out altogether. But I -- so I
20 don't think it's appropriate, but if you're in
21 Nieves land at all, this is a Lozman case. This
22 is a case where, remember, Lozman says where the
23 -- where the -- where government officials have
24 adopted an official policy of targeting speech
25 on a matter of concern, public concern for

1 retaliation, that's a straightforward
2 retaliation case, Mt. Healthy. It doesn't -- it
3 the -- the -- the -- the requirements in Nieves
4 don't -- don't apply.

5 And so -- so I think whether you're in
6 Nieves land or not, this case would have to --
7 would have to go forward. But I don't think
8 it's appropriate -- it -- it wasn't raised --
9 discussed below, wasn't raised in the Op, and
10 they waive Nieves. They don't really make a
11 Nieves argument. They waive Nieves argument.

12 And then, finally, I would say this
13 Court -- Nieves and Hartman were identified as
14 narrow exceptions to the Mt. Healthy rule for
15 particular criminal contexts. This Court has
16 never extended it to the administrative law
17 enforcement context that we have here, and I
18 think there would be very serious questions
19 about -- about doing that.

20 And as to Mt. Healthy, we've clearly
21 made out a case. All you have to demonstrate is
22 that, as Justice Alito was saying in the former
23 case, that you have identified that they have
24 targeted you for some adverse action and that
25 the -- they did so, the substantial motivating

1 factor was your speech.

2 Well, they've admitted as much in
3 public statements, as well as private backdoor
4 meetings. So we clearly meet Mt. Healthy. And
5 it would be open to them on -- on -- at trial to
6 say, well, we have some alternative theories.
7 You'll hear my friend advance some various
8 alternative theories. Those are open to them at
9 trial.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 MR. COLE: But this is a motion to
13 dismiss.

14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas, anything further?

16 Justice Alito?

17 JUSTICE ALITO: On -- on the question
18 of the meaning of coercion, I can think of a --
19 of a spectrum, and on one end of the spectrum, a
20 government official says, look, suppress this
21 speech and, if you don't do it, I have legal
22 weapons I can use against you and I'm going to
23 punish you using those. That's very clear
24 suppression -- coercion.

25 At the other end, the -- the

1 government official who has no authority to do
2 anything for any practical purposes to the
3 entity that the government official is speaking
4 to says you should do this. It -- it would be a
5 good thing to do, you'd be a good citizen if you
6 did it.

7 And in between, there are a lot of
8 different gradations, particularly when the
9 official who's making this request has that
10 power and you have to assume that the person or
11 the entity to whom or to which it -- the request
12 is being made knows that, just as I -- I am sure
13 that these insurance companies were well aware
14 of the power of Ms. Vullo.

15 So how do you define when it goes too
16 far along that line?

17 MR. COLE: So I do think that the
18 power of the official over those to whom she is
19 speaking is a relevant factor in the assessment,
20 but the assessment is, at the end of the day,
21 would a reasonable person in these -- in this
22 situation feel that the government is coercing
23 it, that it is implying some sort of threat of
24 action against it, of adverse action against it.

25 So the mere fact that someone

1 exercises regulatory power over you I don't
2 think is sufficient, but when combined with what
3 you have here, explicit requests to -- to punish
4 a group because of its advocacy and the
5 invocation of the very tools she has to make
6 life miserable for them, you're not managing
7 reputational risk, we might fine you, or, you
8 know, you -- you've got these technical
9 insurance infractions, we might go after your
10 partners and -- and require them to never
11 provide you affinity insurance ever again, this
12 is on the -- you know, the first end of the
13 spectrum that you identified, Justice Alito.

14 So I -- I agree there are hard cases
15 in the middle, and that's true with any standard
16 that at end of the day looks at coercion. You
17 know, in the --- in the -- the context of
18 confessions, coerced confessions, there are some
19 hard, hard lines to draw. This one is not.

20 JUSTICE ALITO: Okay. The -- the
21 Solicitor General urges us not to consider the
22 enforcement -- enforcement actions against
23 Lloyd's, Lockton, and Chubb's and the consent
24 decrees, and it argues that the district court
25 held that those actions are entitled to absolute

1 prosecutorial immunity, and Petitioner has not
2 challenged that holding here.

3 Do you want to comment on that?

4 MR. COLE: Yes. Thank you.

5 Respondent never asserted absolute immunity with
6 respect to the Bantam Books -- the First
7 Amendment claims in this case. Absolute
8 immunity was only asserted with respect to a
9 separate selective enforcement claim. They
10 chose, with respect to the First Amendment
11 claims, to only assert qualified immunity.
12 That's number one.

13 So it's -- it was not asserted below.
14 It was not asserted in the court of appeals. It
15 was not raised in the BIO. It's not appropriate
16 for this Court to decide at this -- a -- a -- at
17 this -- at this stage.

18 JUSTICE ALITO: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: Tell me how -- and
22 I'm going to ask the SG this question -- how do
23 we write this case for you and that would differ
24 from how the -- you think the SG would write it?
25 Because Justice Barrett asked you whether you

1 were breaking new ground, and you say I'm not.

2 But it seems to me you're trying to in
3 the way you're putting this. There's a lot
4 about the guidance letters that you agree
5 standing on their own would be okay.

6 I'm still not sure that if the
7 February 18th meeting had not happened, that
8 standing alone, that guidance letter, as
9 written, would necessarily be coercion.

10 I'm not sure the consent decrees could
11 be viewed as selective prosecution when there is
12 no question, I don't believe, that the Carry
13 Guard had provisions, the Carry Guard insurance
14 policies, had provisions that violated New York
15 law. They reimbursed for criminal activity and
16 they reimbursed for intentional acts, which New
17 York insurance law clearly says you can't do.

18 So tell me -- so, standing alone, none
19 of these things might be coercive. I see this
20 as in light of --

21 MR. COLE: Yeah.

22 JUSTICE SOTOMAYOR: -- the February
23 18th meeting, these things now, which is how the
24 district court wrote it. So how would you write
25 it differently than the district court did,

1 number one? And, number two, how would you
2 write it differently than the SG would?

3 MR. COLE: I -- I -- I -- I would
4 write it that Bantam Books holds that when
5 government officials encourage third parties to
6 penalize a speaker because of its views, they
7 cannot use coercion to further that end. Here,
8 Respondent used coercion.

9 JUSTICE SOTOMAYOR: And what do you --

10 MR. COLE: She -- she used -- she --

11 JUSTICE SOTOMAYOR: -- define as
12 coercion?

13 MR. COLE: The threat, implicit or
14 explicit -- and my friend agrees they can be
15 implicit or explicit -- of -- of government --
16 of coercive government action. That's -- that's
17 -- that's coercion.

18 And, here, she explicitly threatened
19 that to Lloyd's. She said, I'll go easy on you
20 if you cut your ties with the NRA. That's the
21 same as I'll go hard on you if you don't cut
22 your ties with the NRA.

23 She invoked her authority to punish
24 organizations and financial institutions with
25 respect to failing to manage reputational risk

1 and made it clear that what she meant by "manage
2 reputational risk" was cut your ties with the
3 NRA.

4 And then she very shortly thereafter
5 announced these consent orders with three of the
6 NRA's principal insurance providers in which she
7 not only punishes them for insurance infractions
8 but imposes an extraordinary ban, a lifetime
9 ban, in perpetuity.

10 These organizations can never provide
11 affinity insurance to the NRA, even if every T
12 is crossed and every I is dotted under New York
13 law. And with respect to Chubb, one of the
14 three, she got them to agree not to provide
15 insurance to the NRA anywhere in the country,
16 not just in New York. She has no jurisdiction
17 out there.

18 So I think, when you look at those
19 three -- and I think you -- you -- you -- under
20 Bantam Books, you have to look at the -- the --
21 the -- the -- the -- the government's action as
22 a whole, you see that she encouraged third
23 parties, insurance companies and banks --

24 JUSTICE SOTOMAYOR: I -- I -- I --

25 MR. COLE: -- right?

1 JUSTICE SOTOMAYOR: You still haven't
2 told me how you're going to write it
3 differently than the SG.

4 MR. COLE: The only -- I think the
5 only difference between the SG and us is the SG
6 says the -- the guidance letters might be a
7 closer question, but they support the allegation
8 that she targeted this group and sought to use
9 coercion. And then they say, with respect to
10 the consent law -- letter, there was absolute
11 immunity. But, as I -- as I had the discussion
12 with Justice Alito, they didn't assert absolute
13 immunity with respect to the First Amendment
14 claim that comes out of the consent letter, so
15 --

16 JUSTICE SOTOMAYOR: All right. Thank
17 you.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?
19 Justice Gorsuch?

20 JUSTICE GORSUCH: We've gone back and
21 forth all morning about the standard. But it's
22 -- you've got a First Amendment retaliation
23 claim in this case. And we often look at
24 retaliation in -- in the Title VII context in
25 just the manner you described, the effect it

1 would have on a reasonable person in this
2 circumstance.

3 Do you see any daylight really between
4 those two standards?

5 MR. COLE: In terms of defining what
6 constitutes --

7 JUSTICE GORSUCH: Yeah.

8 MR. COLE: -- an adverse action?

9 JUSTICE GORSUCH: Right.

10 MR. COLE: I'm not -- I'm not sure
11 that there is. I -- I -- I -- I think -- I -- I
12 don't know that for this case one has to look
13 very hard to see adverse action when you see a
14 -- a -- a concerted campaign, million-dollar
15 fines, the -- the -- you know, an -- an explicit
16 threat to a major insurance provider, we're
17 going to go hard on you if you don't cut your
18 ties with the NRA.

19 In that context, there's -- this is
20 clearly an adverse action under Title VII, under
21 any English-language understanding of adverse
22 action.

23 JUSTICE GORSUCH: Retaliation is a
24 familiar concept in -- in a lot of our case
25 laws, is all I'm trying to point --

1 MR. COLE: Yes. No.

2 JUSTICE GORSUCH: -- out here. Yeah.

3 MR. COLE: And I think -- I think,
4 look, you -- you could look at this --

5 JUSTICE GORSUCH: And they have gray
6 area cases, all of them.

7 MR. COLE: Right.

8 JUSTICE GORSUCH: Okay.

9 MR. COLE: And I -- I think you -- I
10 think, you know, Bantam Books and retaliation
11 are slightly different, I think, in their -- the
12 way they -- they conceptualize the First
13 Amendment violation. Bantam Books, encouraging
14 a third party to punish speech with coercion.

15 JUSTICE GORSUCH: Can we look at the
16 Lloyd's incident in isolation or -- I mean, you
17 have a complaint, we're at the motion to dismiss
18 stage, we have to take inferences in your favor.

19 MR. COLE: Yeah.

20 JUSTICE GORSUCH: And, certainly, you
21 don't want to be to be limited on remand to
22 arguing just the Lloyd's incident as your --
23 your case.

24 MR. COLE: Well, that's right. I
25 mean, you -- you know, I -- I think, right now,

1 the most significant harm to the NRA is that the
2 DFS continues to maintain on its website these
3 guidance letters, which essentially put a
4 scarlet letter on the NRA with respect to every
5 bank and every insurance company in New York.
6 Those should be taken down.

7 So we would urge you, both for
8 purposes of guidance to -- to others and because
9 it matters to -- to the -- to the ultimate
10 remedy in this case, to address the -- the --
11 the -- the meeting with Lloyd's, the guidance
12 letters, and the subsequent enforcement action.

13 And the other thing I would say about
14 the meeting with Lloyd's is it was in private.
15 It was in private. So that, we -- we -- the NRA
16 might have -- have suffered some damages
17 vis-à-vis Lloyd's with respect to that meeting.
18 But the real damage in terms of the -- you know,
19 putting the scarlet letter on the NRA comes from
20 her public actions and Governor Cuomo's public
21 actions to issue these guidance letters.

22 So I would urge you to address the
23 whole picture here, to -- to reinforce Bantam
24 Books, and to reverse on the -- on the merits.

25 JUSTICE GORSUCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 JUSTICE KAVANAUGH: Quickly, your view
4 on the four-part test that some of the circuits
5 have developed?

6 MR. COLE: You know, I think it's a --
7 I think it's fine. I -- I -- I think --

8 JUSTICE KAVANAUGH: That's about all I
9 need if --

10 (Laughter.)

11 MR. COLE: Yeah. I -- I don't -- I
12 think -- I think it -- it gets --

13 JUSTICE KAVANAUGH: You can explain,
14 but --

15 MR. COLE: Yeah, and I would just say,
16 as long as -- as long as the ultimate inquiry is
17 has the government engaged in coercion, has it
18 invoked --

19 JUSTICE KAVANAUGH: Right.

20 MR. COLE: -- its coercive authority
21 in some way, shape, or form?

22 JUSTICE KAVANAUGH: And what if New
23 York went to insurance companies and said, we
24 don't want you to continue insuring gun
25 manufacturers or sellers for the same reasons?

1 How does that constitutional analysis work?

2 MR. COLE: Well, that wouldn't be a
3 First Amendment problem because I don't think --

4 JUSTICE KAVANAUGH: Why? What would
5 it be?

6 MR. COLE: -- there's a First -- but
7 it might --

8 JUSTICE KAVANAUGH: Would it be
9 anything?

10 MR. COLE: It might be a Second
11 Amendment problem. I don't know. But I -- I'm
12 not sure it would. I mean, it's -- if it's
13 focused -- if the government's coercion is
14 focused on conduct rather than speech, then it's
15 not a First Amendment problem.

16 JUSTICE KAVANAUGH: And that's then my
17 last question. On Bantam Books, this a little
18 bit unusual, obviously, because it's not going
19 to -- the government's not going to a
20 communications company, a bookstore, a social
21 media company, to say, take down that speech,
22 but it's going to an insurance company.

23 But I guess I take your point that
24 Bantam Books, as long as the ultimate action is
25 against speech, it doesn't matter that the

1 intermediary is not itself a speech business.

2 MR. COLE: Yeah, I think the key is
3 it's this use of the third party to punish the
4 target. So, for example, in Bantam Books, if
5 they had said, we're going to encourage
6 insurance -- those -- those providers of
7 insurance, the bookstores --

8 JUSTICE KAVANAUGH: Yeah.

9 MR. COLE: -- to stop providing
10 insurance, that wouldn't be a speech
11 intermediary, but it would be the same problem.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 JUSTICE BARRETT: I just want to give
16 you a chance, Mr. Cole, to address your friends
17 on the other side's arguments that we shouldn't
18 reach the merits because we lack jurisdiction on
19 the -- because we denied cert on the qualified
20 immunity question. And then they also say that
21 the injunct -- claim for an injunction is no
22 longer in the case because you didn't
23 cross-appeal it. I just wanted you -- to give
24 you a chance to address that.

25 MR. COLE: Yeah. Yeah. Thank you.

1 No, no this Court did not divest itself of
2 jurisdiction when it granted the case and asked
3 for briefing on only one of the two questions
4 presented.

5 If the Court reverses on the First
6 Amendment ground, it would be totally
7 appropriate to send it back to the Second
8 Circuit to reconsider the qualified immunity
9 question, which is, as Respondent herself argued
10 in the Second Circuit, inextricably intertwined
11 with the merits determination.

12 The Court's assessment of the merits
13 here is basically disregard of what happened at
14 Lloyd's. It's adopting every inference in favor
15 of Vullo and against the NRA with respect to the
16 guidance letters. All of that infected not the
17 -- just the merits determination but the
18 qualified immunity determination.

19 So the -- the Court has jurisdiction
20 over the case. It can reverse on the question
21 it took up, and then it can ask the Second
22 Circuit --

23 JUSTICE BARRETT: What about the
24 injunction?

25 MR. COLE: And as to the injunction,

1 it was no final -- the -- the -- this was --
2 there was no final order. There's no final
3 judgment. And so we have the right to appeal
4 that and we will appeal that when the -- when
5 there's a final judgment. This was an
6 interlocutory appeal from a qualified immunity
7 holding only, so we had no obligation to
8 cross-appeal.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 JUSTICE JACKSON: So Justice Kavanaugh
12 picked up on what I think might be a critical
13 distinction, and I'm just trying to understand
14 it. So he said here we have a situation in
15 which the government is not acting on a company
16 that is itself in the business of speech, which
17 is true, unlike Bantam Books, where it was.

18 And so what I'm worried about is your
19 position ultimately reducing to anytime a
20 regulator enforces the law against an entity
21 that does business with an advocacy
22 organization, we have a First Amendment
23 violation because it seemed like your answer to
24 him was, well, what gets this into the First
25 Amendment column, unlike other scenarios, is

1 that the NRA advocates for guns, and it's an
2 advocacy organization, and so action taken
3 against it makes it a First Amendment
4 violation --

5 MR. COLE: Yeah.

6 JUSTICE JACKSON: -- even though the
7 government was not coercing the speech itself in
8 the same way as Bantam Books.

9 So how do we avoid a world in which
10 advocacy organizations are exempt from
11 regulation?

12 MR. COLE: Yeah. So we're definitely
13 not asking for a, you know, advocacy
14 organization exemption from regulation or even
15 from regulation of third parties. What Bantam
16 Books requires is that the government encourage
17 third parties to punish speech. Once they've
18 done that, it --

19 JUSTICE JACKSON: But is it -- it --
20 it's not -- forgive me, but it's not punishing
21 speech. It is censoring speech.

22 MR. COLE: No, it's -- it's -- it's --
23 in -- in -- it's true in Bantam Books it was
24 about --

25 JUSTICE JACKSON: Right.

1 MR. COLE: -- censoring speech, but,
2 again, as I have said --

3 JUSTICE JACKSON: But why isn't that
4 relevant? I mean --

5 MR. COLE: Be -- be --

6 JUSTICE JACKSON: -- Justice Gorsuch
7 suggests that you might have a retaliation
8 claim, which is a kind of First Amendment, it's
9 a species of First Amendment. You allege it in
10 this case. And that makes perfect sense, right,
11 that they're -- they're punishing me because of
12 my speech. That's retaliation.

13 Censorship is something different.
14 And what I'm suggesting is that Bantam Books is
15 a -- basically a censorship case, that what
16 they're doing is forcing these companies to take
17 down or -- or remove speech that the government
18 objects to.

19 And that I don't quite see happening
20 here, as opposed to the other theory that you do
21 allege, which is they don't like what it is that
22 we do and they're using the levers of government
23 to prevent us from operating.

24 MR. COLE: Yeah. And -- and if there
25 were a distinction in the First Amendment

1 between censorship and burdening speech because
2 of its content, then maybe that would be
3 correct. But there is no such distinction.

4 The First Amendment requires strict
5 scrutiny when the government censors speech
6 because it doesn't like what it -- its content,
7 when it burdens speech because it doesn't like
8 its content.

9 And in this case, it sought to burden
10 rather than censor. But that doesn't -- it
11 doesn't in any way alter the -- the -- the logic
12 of Bantam Books, the way Bantam Books has been
13 applied for 60 years. It has been applied
14 consistently to situations in which government
15 officials --

16 JUSTICE JACKSON: I've never seen any
17 other situation like this. All of the other
18 Bantam Books situations --

19 MR. COLE: Well, no, I think --

20 JUSTICE JACKSON: -- are censorship
21 situations.

22 MR. COLE: No, I don't think so, with
23 all due respect. Backpage is -- is exact --

24 JUSTICE JACKSON: Backpage?

25 MR. COLE: Backpage is -- the Seventh

1 Circuit decision by Judge Posner is -- is very
2 similar. It was a sheriff who was -- didn't
3 like what -- what a particular social media
4 platform was doing, and what he did was he
5 encouraged credit card companies not to do
6 business with that platform --

7 JUSTICE JACKSON: All right. Thank
8 you.

9 MR. COLE: -- and he did it through
10 coercive means.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. COLE: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. McDowell.

15 ORAL ARGUMENT OF EPHRAIM McDOWELL
16 FOR THE UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING NEITHER PARTY

18 MR. McDOWELL: Thank you, Mr. Chief
19 Justice, and may it please the Court:

20 Government officials may criticize
21 private speech that they deem harmful and
22 persuade citizens not to support that speech,
23 but government officials may not threaten to
24 take adverse action against private parties to
25 coerce those parties into penalizing a

1 disfavored speaker.

2 Taking Petitioner's allegations as
3 true, that is what Respondent did here. In the
4 Lloyd's meeting, she explicitly threatened to
5 bring an enforcement action against Lloyd's
6 unless Lloyd's "ceased providing insurance to
7 gun groups, especially the NRA."

8 The Court should find a
9 straightforward First Amendment violation under
10 Bantam Books, but in recognizing the First
11 Amendment claim here, the Court should take care
12 to avoid suggesting any new limits on the
13 government's ability to speak to the public or
14 its ability to provide ordinary legal guidance
15 to regulated entities.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: Could the government,
18 rather than coerce a third-party, simply entice
19 them to reach the same suppression -- do the
20 exact same thing and suppress speech?

21 MR. McDOWELL: Well, it depends,
22 Justice Thomas, what you mean by "entice." If
23 it doesn't rise to the level of significant
24 encouragement under --

25 JUSTICE THOMAS: Well, what's the

1 difference?

2 MR. McDOWELL: Well, Blum requires
3 that significant encouragement essentially
4 overwhelm the -- the judgment of the
5 independent -- the intermediary, whereas entice
6 --

7 JUSTICE THOMAS: And what would that
8 look like in this case?

9 MR. McDOWELL: You -- in -- in this
10 case, I mean, I think you could kind of -- I
11 think you could think of the offer of leniency
12 that Vullo made to Lloyd's as either a form of
13 significant encouragement because you're saying
14 we will go easy on you for some legal violations
15 or as a threat basically saying we will bring
16 these enforcement actions against you if you do
17 not stop doing business with gun groups.

18 So coercion and significant
19 encouragement are two sides of the same coin, as
20 Mr. Fletcher said earlier.

21 CHIEF JUSTICE ROBERTS: Counsel,
22 there's considerable overlap obviously with the
23 first case. Could you articulate what the
24 significant differences are between your
25 position in this case and the office's position

1 in the prior case?

2 MR. McDOWELL: There are no
3 differences as to the legal principles. The
4 difference here is that there is a specific
5 coercive threat, particularly in the Lloyd's
6 meeting, where she threatened adverse action in
7 the form of an enforcement action so that
8 Lloyd's would comply with a specific instruction
9 to cut ties with all gun groups, especially the
10 NRA, whereas, in Murthy, the plaintiffs did not
11 identify any instance in which the -- a
12 government official threatened to take adverse
13 action against a social media company in -- to
14 get the social media company to engage in
15 specific content moderation. They just point to
16 generic references to legislative reforms that
17 were untethered from any content moderation
18 request.

19 CHIEF JUSTICE ROBERTS: So is it --
20 are you focusing on the specificity of the
21 government action or -- or what?

22 MR. McDOWELL: There -- in Murthy,
23 there was no threat at all. There was no threat
24 of adverse action at all. There were just talks
25 about legislative reforms, but they were not

1 connected to any specific instruction.

2 So coercion in our view requires a
3 threat of adverse action connected to a specific
4 instruction such that it's saying, if you don't
5 do X, we will do Y to you.

6 And that was not in the record in
7 Murthy. It is in the record -- or according to
8 the complaint here with respect to the Lloyd's
9 meeting in particular.

10 JUSTICE ALITO: So does that mean that
11 really the New York officials could have
12 achieved what they wanted to achieve if they
13 hadn't done it in such a ham-handed manner? So,
14 instead of having the meeting with Lloyd's and
15 -- they -- they just gave speeches about the
16 terror -- about guns and how bad the NRA is and
17 they spoke about social backlash against guns
18 and those who advocate for gun rights in the
19 wake of the terrible Parkland shooting, but in
20 all of that, they don't mention anything about
21 any regulatory authority, and then, after
22 harping on that for a while, then they make
23 general statements about the importance of every
24 insurance company taking into account
25 reputational risk, and then they sit back and

1 they see whether that's achieved the -- the
2 desired result, basically, that's what your
3 position is, isn't it?

4 MR. McDOWELL: No, Your Honor. What
5 we're -- we're primarily --

6 JUSTICE ALITO: Well, what -- if I --
7 if what they did was what I just outlined, would
8 that be a violation of Bantam Books?

9 MR. McDOWELL: Probably not because
10 there would be an attenuation between the
11 invocation of legal consequences and the
12 instruction or the message. But we think the
13 first four paragraphs of the guidance letters,
14 standing alone, are permissible government
15 speech because those four paragraphs involved
16 criticisms of the NRA and urging third parties
17 not to support the NRA. That's the classic form
18 of government speech that falls within
19 longstanding tradition. President Reagan
20 expressly criticized the KKK and urged citizens
21 not to support or associate with the KKK.

22 That's what the first four paragraphs
23 are doing.

24 JUSTICE ALITO: Well, and if they had
25 said everything in those first four paragraphs

1 in some other format, it would be a different
2 matter, but this is a guidance letter.

3 MR. McDOWELL: I take the point that
4 --

5 JUSTICE ALITO: I mean, they
6 understand what a guidance letter is about,
7 right?

8 MR. McDOWELL: I take the point that
9 the fact that it's in a guidance letter is
10 highly unusual. You would expect to see this in
11 an op-ed or a -- or a press conference. And
12 that is a factor, I think, in going to the
13 implicit coercive analysis.

14 But, without the fifth paragraph,
15 there's no invocation of an adverse action at
16 all. So the first four paragraphs standing
17 alone, although unusual, would still be
18 permissible government speech.

19 JUSTICE ALITO: Yeah. So they -- they
20 gilded the lily or whatever the phrase is. I
21 mean, they were ham-handed about this. The
22 people up in New York are rubes. They don't
23 really understand how to do this.

24 (Laughter.)

25 JUSTICE ALITO: If you do it in a more

1 sophisticated manner, you can achieve what you
2 want to achieve.

3 MR. McDOWELL: I -- I don't know,
4 Justice Alito, because I don't know that
5 insurance companies and banks would feel that
6 their will was overborne or that they were
7 really at risk of experiencing adverse action in
8 your hypothetical. That's the question. Are
9 the -- are the parties able to exercise their
10 own independent judgment?

11 JUSTICE ALITO: I mean, seriously, you
12 think that sophisticated insurance companies are
13 not taking into account adverse risks? They
14 probably had heard about the Parkland shooting
15 and the aftermath of it. You think they hadn't
16 already taken this into account, and didn't they
17 already know all the power that Ms. Vullo had
18 over them?

19 MR. McDOWELL: They certainly knew
20 about the authority that DFS had, but without
21 any invocation of that authority and a tying of
22 that authority to a specific instruction like we
23 have in the guidance letters, I don't think we
24 would get to coercion. I also --

25 JUSTICE GORSUCH: You -- you agree,

1 though, the fifth paragraph changes the
2 calculus?

3 MR. McDOWELL: Yes, Your Honor, but I
4 want to be -- I want to say something to make it
5 very clear. We think that this has to be
6 considered alongside the press release and the
7 tweet. We think that's one unit of governmental
8 communication, so it's -- we would not look at
9 the guidance letters alone.

10 And we would look at the guidance
11 letters particularly as a way to reinforce the
12 allegations about the Lloyd's meeting rather
13 than considering the guidance letters as a
14 standalone matter.

15 JUSTICE KAGAN: And why are you so --

16 JUSTICE GORSUCH: Do you -- I'm sorry.
17 Go ahead.

18 JUSTICE KAGAN: No, go ahead.

19 JUSTICE GORSUCH: Just to finish up,
20 do you -- do you view this as -- as Justice
21 Barrett asked, as a clear-cut case under
22 existing law?

23 MR. McDOWELL: Yes, Your Honor,
24 especially with the -- with the Lloyd's meeting,
25 absolutely.

1 JUSTICE KAGAN: Why are you so
2 concerned about only looking at the guidance
3 letters in combination with everything else?
4 What would be wrong with looking at the guidance
5 letters alone, given that there is this fifth
6 paragraph?

7 MR. McDOWELL: Yeah. The fifth
8 paragraph, I think, takes you pretty far. And
9 -- and we're not saying that it would be
10 impossible to conclude that that would be a
11 threat alone, but this was one unit of
12 government communication because it was in the
13 same 24-hour period and they were all discussing
14 the same thing.

15 And I think the press release is
16 measurably more explicit. It says it -- it
17 "urges businesses to join the companies that
18 have already discontinued their arrangements
19 with the NRA and to take prompt actions to
20 manage their risks." So it's pointing back to
21 the risk management obligations from the
22 guidance letter, and it's putting it into one
23 sentence to make it very clear.

24 And then the Cuomo tweet says the NRA
25 is an extremist organization, and he's urging

1 companies to revisit any ties they have to the
2 NRA and consider their reputations.

3 And our broader concern is just that
4 plaintiffs will -- if -- if the Court -- Court
5 were to focus on the guidance letter alone, it
6 could allow plaintiffs to try -- try to cobble
7 together First Amendment claims by pointing to
8 disparate statements of government speech and
9 trying to connect them up to invocations of
10 legal obligations. Obviously, it's easier here
11 because it's in one document, but that's our
12 broader concern.

13 And these are also just very unusual
14 documents, the guidance letters, and it's kind
15 of hard to interpret them in isolation because
16 it is very odd to see this sort of government
17 speech in a guidance document.

18 JUSTICE ALITO: If this case goes back
19 for trial, do -- do you claim that the guidance
20 letters and the enforcement actions would not be
21 relevant and admissible?

22 MR. McDOWELL: No, Your Honor. We
23 think the guidance letters would be relevant.
24 As I said, they reinforce the plausibility --

25 JUSTICE ALITO: Yeah. Okay.

1 MR. McDOWELL: -- of the allegations.

2 JUSTICE ALITO: What about the -- the
3 consent decrees? What about the enforcement
4 actions and the consent decrees?

5 MR. McDOWELL: So the district court
6 did held -- did hold that she was entitled for
7 absolute immunity for those. We also think that
8 they were targeting conduct because they appear
9 to have been based on bona fide violations of
10 New York insurance law. So we don't see a free
11 speech concern independently with them.

12 But I do think that the Lloyd's
13 consent decree, again, could bear on the
14 plausibility of the allegations with respect to
15 the Lloyd's meeting in the following way:
16 There's a term in the Lloyd's consent decree
17 that broadly bans Lloyd's from doing even lawful
18 business with the NRA, and that sheds light on
19 the plausibility of the allegation that in the
20 meeting, Vullo was trying to coerce Lloyd's into
21 stopping even lawful business with gun groups.

22 JUSTICE ALITO: Has this Court ever
23 held that every federal and state officer who is
24 the head of an executive department or the head
25 of an independent regulatory agency with

1 enforcement powers has absolutely immunity?

2 MR. McDOWELL: No, Your Honor. But
3 this was a prime -- the -- the holding of the
4 district court was that this was a -- she was
5 exercising prosecutorial function with respect
6 to the enforcement actions at issue.

7 JUSTICE ALITO: Yeah. Have we ever
8 held that all of those officials have absolute
9 prosecutorial immunity?

10 MR. McDOWELL: No, Your Honor. We're
11 not taking a position on the merits of the
12 absolute immunity question to be clear.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas, anything further?

16 Justice Alito?

17 Justice Sotomayor?

18 JUSTICE SOTOMAYOR: So I already
19 previewed what my question would be. How do you
20 see them writing -- wanting the opinion and how
21 do you want it? And tell me what the
22 differences are and why they're important.

23 MR. McDOWELL: So our first order
24 preference is, as I said, to use the guidance
25 letters as a way to reinforce the plausibility

1 of the allegations about the Lloyd's meeting and
2 to hinge the First Amendment analysis on the
3 Lloyd's meeting because that's an explicit
4 threat.

5 It's just a straightforward way of
6 resolving this case. And as I said, the
7 guidance letters reinforce the plausibility of
8 those allegations because the guidance letters
9 were sent not only to insurance companies but
10 also to banks. And there's no suggestion that
11 the NRA was doing unlawful business with banks.

12 And, of course, the guidance letters
13 also expressly urge insurance companies and
14 banks to cut all ties with the NRA, not just the
15 lawful business. So that -- those aspects of
16 the guidance letters reinforce the allegation
17 that in the Lloyd's meeting, she was trying to
18 coerce Lloyd's to stop all of its business with
19 gun groups, not just to target unlawful conduct.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?
21 Justice Gorsuch?

22 Justice Kavanaugh?

23 Justice Barrett?

24 JUSTICE BARRETT: No.

25 JUSTICE JACKSON: Just one quick

1 clarification. You say the Lloyd's meeting is
2 an explicit threat. So, fine, let's say they
3 state a claim. What's next in terms of proof?
4 Don't they have to show something about her
5 motivation?

6 MR. McDOWELL: So -- so, Justice
7 Jackson, that gets to, I think, something Mr.
8 Cole was talking about. There are two kind of
9 aspects of this sort of claim. There's the
10 coercion question, and then there's the First
11 Amendment harm question. Here, the First
12 Amendment harm is based on viewpoint
13 discrimination. So, yes, they would have to
14 show that she was motivated by the -- the
15 targeting of a particular viewpoint, as opposed
16 to the targeting of conduct.

17 We just think that the complaint
18 alleges that that's what her motive was because,
19 on page 223, it says -- I think says it most
20 explicitly, 223 of the Petition Appendix, she
21 was engaging in this threat in order to get
22 Lloyd's to aid DFS's campaign against gun
23 groups. So there's a focus on the speech aspect
24 of the NRA, as opposed to any conduct that it
25 was engaging in.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Katyal.

5 ORAL ARGUMENT OF NEAL K. KATYAL
6 ON BEHALF OF THE RESPONDENT

7 MR. KATYAL: Thank you, Mr. Chief
8 Justice, and may it please the Court:

9 The key fact in this case is the
10 conceded illegal conduct. As Justice Sotomayor
11 said, the three insurers and the NRA broke the
12 law. They were selling intentional criminal act
13 insurance, and all of the products they offered
14 were unlawful because the NRA refused to get a
15 license. That's why Bantam Books is miles away
16 from this case, and it's why the court below
17 found qualified immunity protects Vullo.

18 In this posture, Iqbal demands courts
19 ask, as between the invidious coercion asserted
20 or the obvious explanation she was enforcing the
21 law, is coercion plausible? When illegal action
22 is present, the plausibility burden is higher.
23 To use Mr. Cole's phrase, the government is more
24 likely responding to conduct than, not speech,
25 and four separate doctrines explain why.

1 First, Iqbal held plausibility rules
2 are especially important in suits where
3 government defendants assert qualified immunity
4 because they must be neither deterred nor
5 distracted from vigorous performance by
6 disruptive discovery.

7 Second, the presumption of regularity
8 is at its height.

9 Third, absolute immunity protects
10 enforcement actions.

11 And, fourth, causation is more
12 difficult.

13 That is particularly so after
14 Parkland, which led many businesses that
15 Ms. Vullo has no control over, such as United
16 Airlines and Avis Cars, to sever ties with the
17 NRA.

18 For this Court to accept this thin
19 complaint and the teeth of the conceded illegal
20 conduct, it would empower strike suits to enjoin
21 valid enforcement and open sensitive discovery.
22 That's why the court's traditional test here is
23 right. A government official crosses the line
24 from coercion to persuasion when, one, they are
25 objective -- when they are threatening as

1 opposed to encouraging and, two, there is no
2 objectively reasonable basis for their action.

3 The NRA can't meet that test, and
4 that's why they are seeking to weaponize the
5 First Amendment and exempt themselves from the
6 rules that govern you and me, simply because
7 they're a controversial speaker.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Would you spend just
10 a small amount of time explaining why you think
11 the conduct, all of this, is infected by, I
12 guess, the one illegal insurance product
13 involved here?

14 MR. KATYAL: So, Justice Thomas, our
15 position and Ms. Vullo's position throughout has
16 been there's not one illegal insurance product,
17 it's all illegal. And the attachments to the
18 complaint attach the consent orders which make
19 that clear.

20 The NRA never got a license for all of
21 the affinity products. It's their burden to
22 prove -- I know the word -- "lawful insurance
23 product" is in the complaint. They never
24 identified it in the complaint.

25 Our red brief spent, obviously, a huge

1 amount of time on this and called them out. To
2 this day, they haven't explained one lawful
3 product that was ever insured -- issued by these
4 three insurers, and that's why we think, if
5 you're asking yourself under Iqbal and Twombly
6 is there an obvious likely explanation for
7 what's going on, that's what it is. That's why
8 the consent orders read the do -- the way they
9 do.

10 JUSTICE SOTOMAYOR: Sorry, these
11 affinity programs could have been altered. And
12 these consent decrees and what she was seeking
13 was a ban even of potentially lawful affinity
14 programs.

15 I mean, if they had taken out the
16 intentionality provision or the criminal
17 activity provision and just insured for
18 accidents with guns or things like that, those
19 would have been lawful.

20 MR. KATYAL: So --

21 JUSTICE SOTOMAYOR: She went further
22 and said you can't even have --

23 MR. KATYAL: And DFS and regulators do
24 that all the time, Justice Sotomayor. So there
25 are two buckets of illegal activity, serious

1 illegal activity that Ms. Vullo isolated, and
2 they're at issue in the -- in the consent orders
3 by name.

4 One is the provision of intentional
5 act insurance, sometimes called murder
6 insurance. That violates public policy in New
7 York, as almost every state.

8 Second, the fact NRA was doing all of
9 these affinity products without a license. Now,
10 just without a license alone, DFS routinely
11 imposes massive sanctions, including lifetime
12 bans.

13 For example, in MetLife, which we cite
14 in our brief, in 2014, they were offering -- did
15 the same thing, offering unlicensed insurance
16 with a partner, lifetime ban. Lifetime bans are
17 not unusual. They happen all the time. In
18 securities regulation, you can have a lifetime
19 ban for a meeting.

20 What normally happens, Justice
21 Sotomayor, in these cases is, if the NRA ever
22 decided that they wanted to get a license and
23 offer a lawful plan, they then come back and
24 seek a modification of the consent order. But
25 there's nothing unusual whatsoever about a

1 punishment like this.

2 What is unusual is to allow a strike
3 suit like this. Remember, this case was filed
4 during the investigation, in May of 2018, in
5 order to stop it from going forward.

6 The consent orders then happened. And
7 -- and so now they're here trying to effectively
8 undo that enforcement action. And the worry
9 here, it's not just about this case. It's about
10 any case because everyone can allege, what --
11 you know, can stop a plea negotiation or a
12 consent set of negotiations by saying you're
13 retaliating against me.

14 I mean, you know, if you just think
15 about what Dinesh D'Souza said publicly in -- in
16 his filings or Michael Avenatti about the
17 President, I'm being retaliated against because
18 of me -- because of my speech. And that's the
19 danger, and that's why there's always been an
20 objective unreasonability standard.

21 And Mr. Cole says in his brief at page
22 23, in his reply brief, oh, don't worry, the NRA
23 will never do this, we've only filed one suit on
24 Bantam Books before in our history and it's this
25 one.

1 That's wrong. In five minutes of
2 Internet research, we found another case in
3 which the NRA sued San Francisco on exactly that
4 theory. And if you look at his amici briefs, at
5 least 10 of them admit they want to do this to
6 open up lawsuits for when Chick-Fil-A isn't
7 being zoned in the right place --

8 JUSTICE SOTOMAYOR: Counsel, you've
9 answered my question.

10 CHIEF JUSTICE ROBERTS: Mr. -- Mr.
11 Katyal, what do you do about your friend's
12 argument that you've waived this, not raising it
13 in the district court or the court of appeals or
14 in the brief in opposition?

15 MR. KATYAL: So the -- he has a couple
16 of waiver arguments. Which is the "this," the
17 absolute immunity point?

18 CHIEF JUSTICE ROBERTS: Yeah. I'm
19 sorry, yes.

20 MR. KATYAL: Yes. So, on absolute
21 immunity, I don't think that we -- we waived it.
22 So, you know, we -- first of all, everything I
23 just said before doesn't turn on absolute
24 immunity or not. I may -- I'm explaining why
25 this wasn't coercive, what happened in either

1 the Lloyd's meeting or the consent orders.

2 Now we do think there's a separate
3 argument about absolute immunity and there's
4 good reason to reach it. It's -- was ventilated
5 down below, and I think it's squarely before
6 this Court.

7 So here's what the district court said
8 at Petition Appendix 53A. This is its holding.
9 "Vullo's decision to enter into the Lockton,
10 Lloyd's, and Chubb consent orders and their
11 precise terms are all entitled to absolute
12 immunity because they are prosecutorial actions
13 premised on enforcement decisions intimately
14 associated with the judicial process."

15 Now it's fair, as he says, we raised
16 that in the selective enforcement claim but the
17 not in the First Amendment one, but there is
18 good reason for that because, at that point in
19 the district court, their First Amendment claims
20 were focused entirely or almost entirely on the
21 letters and the press release and absolute
22 immunity we're not claiming attended -- attended
23 to those acts. We're saying it explains what
24 happened in the consent orders and in the 2/27
25 Lloyd's meeting.

1 JUSTICE KAVANAUGH: Mr. Katyal, it's a
2 bit jarring, I guess, for me that the Solicitor
3 General is on the other side from you in this
4 case given that the Solicitor General represents
5 the United States and, as we know from the last
6 case, has a very strong interest in not
7 expanding Bantam Books.

8 So how should we think about that?

9 MR. KATYAL: Yeah. I think, you know,
10 I don't want to characterize their motivations
11 or anything. I just think ultimately, when they
12 get to, you know, what -- their test is not
13 different than our test.

14 I think we're all basically in
15 agreement that, for example, that the Second
16 Circuit got it right. The Second Circuit's test
17 is government officials cannot use their
18 regulatory powers to coerce individuals or
19 entities into refraining from protected speech.

20 At the beginning of the --

21 JUSTICE KAVANAUGH: Are you okay with
22 that four-part test?

23 MR. KATYAL: Absolutely. Fine with
24 that.

25 JUSTICE KAVANAUGH: Yes.

1 MR. KATYAL: I think the difference is
2 that we do have -- insist on an objective
3 reasonability when you're dealing with
4 enforcement actions, that second prong that I
5 started with, because, otherwise, you're opening
6 the door to, as Nieves points out, anyone can --
7 and anyone will be highly incentivized if
8 they're the target of an investigation to say
9 I'm being retaliated against. So you need to
10 show objective unreasonability, and it's here
11 where their claims fall apart.

12 They were doing massively illegal
13 things. New York -- New -- New York enforces
14 that all the time. If their complaint pled
15 something like jaywalking and said: Look,
16 you're not enforcing it, except against us, that
17 states a claim.

18 JUSTICE GORSUCH: Mr. -- Mr. --

19 MR. KATYAL: That's not this
20 complaint.

21 JUSTICE GORSUCH: I'm sorry, Mr.
22 Katyal, just to follow up on Justice Kavanaugh's
23 original question, it seems like that we're all
24 in agreement that the law here is clearly
25 established under Bantam Books and it's just a

1 matter of application. Is -- is that right?

2 MR. KATYAL: So I -- I certainly think
3 the law is clearly established in terms of the
4 -- what I read to you at the Second Circuit is
5 fine.

6 JUSTICE GORSUCH: The standard, yeah?

7 MR. KATYAL: The Second Circuit
8 standing.

9 JUSTICE GORSUCH: Yeah, you think
10 that's clearly established. Okay, thank you.

11 MR. KATYAL: Yes. So -- so the
12 concern is, without an objective reasonability
13 test, you open the door to people filing strike
14 suits against enforcement actions all the time.

15 Now I guess they then say: Well,
16 okay, it's not the 2/27 meeting with Lloyd's or
17 the consent orders themselves. You've got to
18 read that in light of the guidance letters, the
19 guidance letters.

20 We think absolutely you should look at
21 them all together, as the Solicitor General
22 says.

23 JUSTICE KAVANAUGH: And I think they
24 do say the meeting itself is enough.

25 MR. KATYAL: Yeah. And if that

1 meeting is enough, Justice Kavanaugh, every
2 meeting, every plea negotiation's enough.
3 That's literally what they are. They're done in
4 secret, behind a closed door, to use their
5 insidious language. That's the natural give and
6 take.

7 What Vullo said, according to their
8 own allegations, is we've got some goods on you,
9 and we are willing to look past some in order to
10 make a resolution here.

11 Now it's true that she and -- and
12 Governor Cuomo have said things about the NRA.
13 There's nothing that ties that give-and-take in
14 the complaint, and certainly not plausibly so,
15 to the -- to the -- the feelings about the NRA.

16 And, by the way, the tweets that my
17 friend has been referring to from Governor Cuomo
18 aren't even in the complaint and were issued
19 months after the complaint was even filed.

20 So I think it's very natural that in a
21 2/27 meeting about resolving these issues,
22 you're going to say: Look, I'm going to look
23 past some issues in order to strike a
24 resolution. That's all that is. And --

25 JUSTICE JACKSON: Mr. Katyal, can I

1 just ask you about the standards again? So
2 suppose I agree with you that illegality was
3 sort of at the heart of what was going on here,
4 that all of the products were illegal. Let's
5 just assume that I agree with you for a second
6 on that.

7 Doesn't that go less to coercion than
8 to the next question, which is whether or not
9 that coercion of a third party affected a
10 violation of the First Amendment?

11 I mean, the fact that the business was
12 illegal doesn't necessarily mean that the
13 February meeting wasn't coercive. I think
14 government action in enforcing the law is
15 coercive. So isn't it just that she has a good
16 defense to the argument that there's a problem
17 here under the First Amendment?

18 MR. KATYAL: I -- I agree with almost
19 everything except your last sentence, Justice
20 Jackson --

21 JUSTICE JACKSON: Okay.

22 MR. KATYAL: -- and the same point
23 you made in the first argument.

24 JUSTICE JACKSON: Yes.

25 MR. KATYAL: Coercion by itself is not

1 illegal. The government coerces all the time,
2 in plea negotiations, in bringing criminal
3 charges, and the like. What makes it illegal is
4 if you're retaliating against someone's speech,
5 and it's that where the complaint falls apart.

6 JUSTICE JACKSON: Do you concede that
7 in this case?

8 MR. KATYAL: That we retaliated --

9 JUSTICE JACKSON: That if she was
10 coercing -- coercing them under these
11 circumstances, it was -- retaliation?

12 MR. KATYAL: Well, no. No.

13 JUSTICE JACKSON: Okay.

14 MR. KATYAL: So we think that it was
15 an exercise of legitimate law enforcement. We
16 think they're absolutely fine to bring a
17 complaint that has some direct evidence that
18 says, oh, no, she is -- actually, this is not a
19 prosecution that would ordinarily be brought.
20 This is, rather, a selective targeting of me.
21 That's, of course, what they lost --

22 JUSTICE JACKSON: But that's at the
23 summary judgment stage, right? I mean, that's
24 not a --

25 MR. KATYAL: Well, it could be --

1 JUSTICE JACKSON: -- motion to
2 dismiss.

3 MR. KATYAL: -- done at 12(b)(6), as
4 it was here, and, indeed, the selective
5 enforcement claim was thrown out. And -- and
6 our point to you is, in order for them to state
7 a claim -- and Nieves says this, you've got to
8 plead and prove. That's the language, "plead
9 and prove." You've said it four times in the
10 decision. And this complaint does not plead and
11 prove that enforcement wouldn't be ordinary --
12 wouldn't -- wouldn't be ordinarily done.

13 What they've said in the complaint is
14 we have some comparators, the Optometrists
15 Association, the New York City Bar offers
16 insurance. And they -- I guess they allege
17 there are technical violations there. None of
18 those folks are doing what the NRA --

19 JUSTICE ALITO: I mean --

20 MR. KATYAL: -- was doing and what
21 Vullo said.

22 JUSTICE ALITO: -- Mr. Katyal, you're
23 shifting the burden to them. This is a First
24 Amendment case. They -- all they need to do is
25 to show that the desire to suppress speech was a

1 motivating factor. They don't have to prove
2 that the -- the regulatory action would have
3 been taken even if Ms. Vullo didn't have this
4 motivation.

5 MR. KATYAL: So -- so I think, Your
6 Honor, that Nieves directly says no to that.
7 What Nieves says is be -- precisely because
8 allegations against enforcement are so easy to
9 allege and difficult to disprove, and because it
10 bumps up against the presumption of regularity,
11 and because it opens the door to massive
12 discovery into sensitive government files, and
13 because it incentivizes people to make
14 controversial speech and then claim an
15 exemption, no, you insist that this be in the
16 pleading itself.

17 And that's -- and -- and, you know,
18 that's consistent, of course, with, like, for
19 example, Iqbal and Twombly, which said similar
20 things even outside of the retaliation context.

21 JUSTICE ALITO: I -- I mean, really,
22 this is kind of -- suppose the allegation was we
23 had a meeting with Ms. Vullo and she pulled out
24 a -- a -- a pistol and she held it to our heads
25 and she said, I'm going to blow your brains out

1 unless you stop writing insurance for the NRA.

2 That would not be enough to even
3 allege a Bantam Books violation because she
4 might have taken that same regulatory action --
5 she might have taken regulatory action for a
6 perfectly legitimate reason.

7 MR. KATYAL: Your Honor, there, the
8 government's conduct would be objectively
9 unreasonable, and it would flunk our test. So
10 we think this is not a hard test. We're not
11 seeking to change the law. We're just pointing
12 out that when you're in a situation like this of
13 conceded illegality that there is an obvious
14 alternative explanation for what Ms. Vullo was
15 doing here, which was enforcing the law.

16 And this is the worst case in order
17 for you to say this should go past 12(b)(6)
18 because, if you allow this case with its
19 conceded illegality to go past back -- go past
20 12(b)(6), then I think any plaintiff will be
21 able to do this.

22 The government --

23 JUSTICE SOTOMAYOR: I'm sorry. What
24 was the conceded illegality?

25 MR. KATYAL: Yeah. So, in the

1 complaint, it attaches the three consent orders
2 by the insurers, all of which say we agree, we
3 were offering illegal insurance. And so --

4 JUSTICE SOTOMAYOR: All right. Those
5 are those three.

6 MR. KATYAL: Yes.

7 JUSTICE SOTOMAYOR: And what does that
8 have to do with the NRA and cutting ties with
9 it?

10 MR. KATYAL: Because they -- they were
11 offering -- what they said was illegal was the
12 insurance products with the NRA, that the NRA
13 refused to get a license. And so all of the
14 insurance --

15 JUSTICE SOTOMAYOR: But what made it
16 illegal for -- NRA didn't have to or it could
17 offer its products to someone else? I'm just --
18 that's where I'm confused.

19 MR. KATYAL: Yeah. So --

20 JUSTICE SOTOMAYOR: It could use a
21 licensed broker to --

22 MR. KATYAL: -- if they -- well, once
23 -- once the NRA was acting in this way as a bad
24 actor, Ms. Vullo entered a -- entered into a
25 consent order with them for a broader

1 prophylactic set of sanctions. This goes back
2 to your first question. That happens all the
3 time. And the reason for that --

4 JUSTICE SOTOMAYOR: Yeah. All right.
5 Then stop. And why are the other program --
6 insurance carriers that are -- have these kind
7 -- similar policies, the New York State Bar
8 Association, all the other people who have
9 similar policies, why are they different?

10 MR. KATYAL: Because they didn't do
11 what the NRA did here and the three insurers,
12 which was not just act as unlicensed but offer
13 this -- these insurance policies that seriously
14 violate public policy, called -- so-called
15 murder insurance, that cover intentional
16 criminal acts.

17 And when you have those two things
18 together, this enforcement action --

19 JUSTICE SOTOMAYOR: I thought some of
20 them did, but I can check the record. Okay.

21 MR. KATYAL: So -- so our -- our
22 position here is that the Court shouldn't --
23 should -- should absolutely look at both of
24 the -- you know, all the different conduct
25 together. We think any one of them individually

1 doesn't add up to something that's coercive, and
2 together, they don't add up to something that's
3 coercive.

4 The other thing -- other point I'd
5 like to make, and this goes back to, Justice
6 Alito, to your points about Iqbal and Twombly --
7 the -- the standard about -- at the pleading
8 stage. I think it's relevant to note that in
9 Twombly itself, there were two alternative
10 explanations for what was going on with these
11 big behemoth government -- big -- big behemoth
12 companies. One was that they were conspiring
13 and illegally agreeing to divvy up the market.
14 The other was that they made individual
15 determinations on their own to do that. Here,
16 it's in -- in what --

17 JUSTICE GORSUCH: And -- and, Mr.
18 Katyal, you're right, Twiqbal says you have to
19 look at the whole of the allegations to
20 determine whether it's plausible or not, right?
21 So, here, doesn't that mean that we have to look
22 at all of the allegations in the complaint?

23 MR. KATYAL: Correct.

24 JUSTICE GORSUCH: Okay.

25 MR. KATYAL: And when you do that, I

1 think the only -- the one we haven't talked
2 about yet is this reputational risk, these
3 industry guidance letters, and we think these
4 industry guidance letters are so far removed
5 from Bantam Books, we'd urge you to look at
6 Footnote 5 in Bantam Books and hold them up
7 against the reputational risk letters.

8 So, in that -- in there -- in those
9 letters, they -- doesn't say anywhere anything
10 like we're going to sue you or we're going to
11 regulate, unlike what the threat was in Bantam
12 Books at Footnote 5, bringing in the Attorney
13 General, bringing in the chiefs of police. They
14 don't say that she's even investigating the
15 companies for anything.

16 There's no reference whatsoever to an
17 investigative body. It doesn't even actually
18 say, as the Second Circuit points out, that
19 there is any reputational risk with the banks
20 and insurers maintaining their ties. It says if
21 any reputational risk.

22 And I think the most important
23 point -- and, Justice Kagan, this goes to
24 something you said to my friend earlier -- is
25 that these letters are viewed -- you know, these

1 aren't the only industry letters DFS sends.
2 They send them all the time and -- including
3 reputational risk letters. And you have amici
4 after amici before you saying these are
5 milquetoast reputation risk letters.

6 And if you want a good example, take a
7 look at the one they cite in their brief about
8 crypto -- about cryptocurrency at page 23. That
9 says companies have legally uncertain practices,
10 they make inaccurate or misleading
11 representations and disclosures, and that
12 agencies are evaluating the legal permissibility
13 and compliance with applicable laws and
14 regulations.

15 Of course, if you're going to issue
16 something like that, you're going to have a
17 disclaimer like the one that they point out in
18 their reply brief. This milquetoast industry
19 letter is the opposite. And the concern we have
20 is that if you point to that as part of a Bantam
21 Books claim, then you're going to disincentivize
22 people to issue reputation risk letters, which
23 are obviously important, as the amici briefs
24 say.

25 CHIEF JUSTICE ROBERTS: You're --

1 you're not suggesting -- I'm skipping back a few
2 minutes. You're not suggesting that if, for
3 example, after the initial conduct by Ms. Vullo
4 and the reaction of the National Rifle
5 Association, if she instructed her staff to go
6 through these policies and find something, you
7 know, that violates some regulation in there,
8 that she could then defend against -- the basis
9 of terminating all that, on the basis of those
10 newly discovered violations?

11 MR. KATYAL: Right. So, there, it
12 would be objectively unreasonable. That's like
13 going through to try and selectively target one
14 person. Nieves says that's going to be
15 impermissible. The difference, Mr. Chief
16 Justice, with this case is they didn't point to
17 a comparator.

18 What Nieves is asking is, is this an
19 outlier prosecution or not? Their only claim
20 is, as Justice Sotomayor was saying, the
21 Optometrists Association and the like. Those
22 folks were not doing the same thing at all. At
23 most, they were offering an unlicensed affinity
24 product. They certainly weren't offering
25 something as dramatically dangerous to public

1 policy as so-called murder insurance.

2 That's why what Ms. Vullo was doing
3 here was absolutely explainable. There's an
4 obvious alternative explanation, to use the
5 Twiqbal words. And that's why, if you let this
6 complaint go forward, you will be then saying to
7 government regulators everywhere that you have
8 to be careful about the speech you say. So, for
9 example, last week, some of you heard the
10 President say, you know, we beat the NRA, we're
11 going to beat the NRA again.

12 You heard my -- in the first argument
13 a discussion about TikTok and -- and, you know,
14 a government -- a hypothetical in which the
15 government attacks TikTok and criticizes it.
16 The -- all of those things -- those statements
17 now will be used as -- in examples in
18 affirmative litigation to -- to issue strike
19 suits to stop enforcement actions by the FTC, by
20 the Justice Department, by states and the like.

21 And, Justice Kavanaugh, I am troubled
22 by the fact the Solicitor General isn't
23 embracing that, but I do think it's important to
24 point out many states are. You have before you
25 a brief by 10 different individuals. I take

1 what the Solicitor General's done is to read
2 paragraph 5 of the reputational risk letter so
3 broadly that it becomes coercive.

4 And we just don't think that opinion
5 can write, that if you tried to do that, you
6 would be opening the door to something very,
7 very dangerous and destructive down the road,
8 which is this case will be cited, and they've
9 already had a track record of using a Bantam
10 Books situation in other enforce -- to stop
11 other enforcement actions, not just this one.

12 And it's not just the NRA today. It's
13 every regulated party tomorrow from TikTok on.

14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas?

16 Justice Alito?

17 JUSTICE ALITO: You say in your brief
18 this case is not even close. Do you stand by
19 that?

20 MR. KATYAL: I -- I do. I do under
21 the existing law, yes.

22 JUSTICE ALITO: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 Justice Kagan?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 Justice Barrett?

4 Justice Jackson?

5 Okay. Thank you, counsel.

6 Rebuttal, Mr. Cole?

7 REBUTTAL ARGUMENT OF DAVID D. COLE

8 ON BEHALF OF THE PETITIONER

9 MR. COLE: Yes. So I agree with my
10 friend on one point. This case is not close.

11 (Laughter.)

12 MR. COLE: With respect to Nieves, he
13 -- he's -- he's taking a -- a particular
14 standard that this Court adopted in the
15 particular context of retaliatory arrests, tens
16 of thousands occur every day, and adopted a
17 particular rule with respect to 1985 -- 1983
18 damage actions.

19 This is a First Amendment question.
20 It's not a 1983 question. It's a First
21 Amendment question that's before you. This is
22 not a retaliatory arrest case. There is -- this
23 is a case that arises very rarely. We've looked
24 at Bantam Books, and in 60 years, there have
25 been about 20 to 40 cases in the courts of

1 appeals over 60 years involving attempts by the
2 government to coerce a third party to punish
3 somebody else's speech. That's very different
4 from the Nieves situation.

5 So that's just not in -- in the law.
6 You would have to change the law substantially
7 to adopt that.

8 Secondly, with respect to the Cuomo
9 tweets, they were issued after the first
10 complaint, but they were issued before the
11 second amended complaint, which is the operative
12 complaint here. And under Tellabs, they are
13 perfectly appropriate to consider at the motion
14 to dismiss stage, judicial notice. Nobody
15 disputes that he said exactly what he said.
16 They want them out of the case because they
17 demonstrate the impermissible motive.

18 Carry Guard, Carry Guard is a red
19 herring here. The Carry Guard program was
20 suspended by Locktons and the NRA in November
21 2017. Everything else -- everything that we're
22 talking about here happened after November 2017.
23 Her meeting with Lloyd's, Lloyd's did not
24 underwrite Carry Guards. And her meeting with
25 Lloyd's says cut your ties with gun groups,

1 especially the NRA, because I'm trying to weaken
2 them. Gun groups don't have Carry Guard. Only
3 the NRA did. It wasn't even operative at that
4 point.

5 The guidance letters say nothing about
6 Carry Guard. This is not a guidance letter
7 about insurance infractions. This is a guidance
8 letter about the NRA and other gun promotion
9 organizations.

10 The NRA's insurance was not all
11 illegal. No, the NRA didn't have an insurance
12 license in New York because it's not an
13 insurance company. Nor does the ABA. Nor does
14 the American Ophthalmologists Association. But
15 they all have affinity insurance, and it's just
16 run by brokers, as Justice Sotomayor said, in
17 New York. That's perfectly legitimate.

18 There were some infractions in terms
19 of how it was marketed, how the compensation
20 structures, that were actually quite commonplace
21 in the industry, and she enforced them against
22 them and not against -- against others.

23 Finally, the notion that this is
24 business as usual, business as usual for a -- a
25 -- a government official to speak with a -- a

1 private party and say we'll go easy on you if
2 you aid my campaign to weaken the NRA, that is
3 not business as usual. That is not an ordinary
4 plea negotiation.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 MR. COLE: Nor is the guidance letter.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 The case is submitted.

10 (Whereupon, at 1:04 p.m., the case was
11 submitted.)

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Official

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